

2001 Legislation Concerning Open Public Meetings and Executive Sessions

The Attorney General's Office online Open Records and Open Public Meetings Deskbook published in 1998 described the provision in the Open Public Meetings Act at RCW 42.30.110(1)(i) for public bodies to meet in an executive session to discuss litigation or "potential litigation." The Deskbook also explained that there were different approaches to interpreting "potential litigation" because the term was undefined in the law, and states that, "Ultimately, the scope of the potential litigation provision will need to be clarified by the legislature or interpreted by the courts." 1998 Deskbook, Chapter 2, Section 2.3(i) (www.wa.gov/ago/records).

During the 2001 session, the legislature provided that clarification. The legislature passed and the Governor signed Substitute House Bill 1384. Chapter 216, 2001 Laws. The legislation became effective July 22, 2001. The legislation also provides that the Attorney General may provide information, technical assistance, and training on the provisions of the Open Public Meetings Act. RCW 42.30.210. Therefore, the Attorney General's Office is offering this memorandum to public agencies and the public to guide them on this new law as it addresses executive sessions to discuss potential litigation, until the 1998 Deskbook is updated and revised.¹

The specific provision in RCW 42.30.110(1)(i) now provides that an executive session can be convened:

To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in adverse legal or financial consequences to the agency. This subsection (1)(i) does not permit a governing body to hold an executive session solely because an attorney representing the agency is present. For purposes of subsection (1)(i), "potential litigation" means matters protected by RPC [Rule of Professional Conduct] 1.6 [confidentiality of attorney-client communications] or RCW 5.60.060(2)(a) [attorney client privilege] concerning:

(A) Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or likely to become, a party;

(B) Litigation that the public body reasonably believes may be commenced by or against the body, the agency, or member acting in an official capacity; or,

(C) Litigation or legal risks of a proposed action or current practice that the public body has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency.

¹ The 1998 Deskbook is in the process of being updated on all topics covered by that online guide to the law, as part of a project separate from this memorandum.

The legislature passed this bill, effective in July 2001, to clarify the circumstances in which public bodies may go into executive session pursuant to RCW 42.30.110(1)(i). After this amendment became law, in September 2001 the State Supreme Court issued an opinion discussing the law prior to the amendments. *In Re the Recall of Lakewood City Council Members et al.*, 144 Wn.2d 583, 30 P.3d 474 (2001). While the opinion discussed the prior law, the case recognized that executive sessions under RCW 42.30.110(1)(i) can be necessary to promote free and open discussion between the public agency client and its legal counsel and therefore the Court specifically recognized the attorney-client privilege exception to the Open Public Meetings Act. The Court concluded, however, that executive sessions are not available where from an objective standard, the agency should know beforehand that the discussion with its attorneys will be benign and was unlikely to result in adverse legal or financial consequences described in the statute.

To provide further guidance under the amendments to RCW 42.30.110(1)(i) the following case examples are offered as hypothetical situations:

Case Example: *A city is considering adopting a new zoning ordinance. The city has received a letter from a citizen alleging that the proposed ordinance violates state law and the citizen may sue. The city council goes into executive session to discuss with its legal counsel the legality of the proposed ordinance. May the city council meet in executive session?*

Resolution: *While the city council may choose to discuss this in the open session, the city council may discuss with its legal counsel in executive session the legality of this ordinance and the threatened litigation. This matter involves both threatened litigation, and presents legal risks that appear likely to result in legal or financial consequences. The discussion, if conducted in an open session, may give an unfair advantage to the potential plaintiff, and may chill the council's attorney from giving candid legal advice to the council on the legality of the ordinance and the threatened lawsuit.*

Case Example: *A county council wants to go into executive session to enable its attorney to inform the members about the laws that affect the council. May the council meet in executive session to receive this information?*

Resolution: *The answer depends upon what the council wants to discuss with its attorney. For example, if the attorney is simply intending to outline various statutes of which the commission should be aware as a general course in conducting its business, the answer may be "no." If, however, the session will consist of an attorney providing opinions on the statutes, focused on potential litigation, in a confidential communication privileged under Rule of Profession Conduct 1.6 and the attorney-client privilege statute at RCW 5.60.060(2), then the answer would be "yes." Both the attorney for the agency and the client agency should be clear, in advance, what the attorney will cover so the decision as to whether to convene in an executive session is made with recognition of the statutory limits.*

Case Example: *A school board wants to meet in executive session to discuss a pending lawsuit. The attorney cannot attend the meeting, either in person or via telephone. May the board meet in executive session to discuss the lawsuit?*

Resolution: *No. The statute requires that the board must "discuss with legal counsel" either litigation or potential litigation before it can meet in an executive session to discuss such matters.*

Case Example: *The U.S. Supreme Court announces a decision of importance to port districts, and may have implications requiring changes to its current practices. The port district board calls an executive session for the district's attorney to brief the board on the decision. Is this proper?*

Resolution: *The answer depends on the discussion by the attorney. The fact of the decision is public and is not privileged information and is therefore appropriate for public dissemination of that fact in the open meeting. The attorney's analysis of the decision, however, and his or her advice on the district's options in light of the decision are appropriate for executive session if the attorney believes that public discussion of the legal risks of continuing the current practice or a proposed action in light of the court decision is likely to result in an adverse legal or financial consequence to the agency.*

Case Example: *A state commission entered a contract with Party A, and is considering entering a second contract with the same party. The attorney advising the commission is aware of bankruptcy laws that create the possibility that Party A could avoid its obligations to the state commission under the existing and proposed contracts. Public discussion of these legal risks would increase the risk the contractor will file for bankruptcy, with adverse financial impacts on the commission. The commission calls an executive session for the assistant attorney general to outline the risks of loss under the existing and proposed contracts. Is this proper?*

Resolution: *Although this situation does not involve actual or pending litigation, public discussion of the legal risks of the proposed contract might result in adverse legal or financial consequences to the agency. The matter could probably be discussed in executive session.*